Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/10023/2014
OA/10028/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13th September 2017	**On 26th September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS YIDIDYA NIGSSE KINFE
MR SOFONIAS NIGSSE KINFE
(ANONYMITY ORDER NOT MADE)

Respondents

Representation:

For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondents: Mr D Taiwo, Legal Representative, UK Law

DECISION AND REASONS

1. For the sake of easy reference I shall continue to refer to parties as they were before the First-tier Tribunal namely that the Appellants Miss Kinfe and Mr Kinfe will be described in this decision as the Appellants and the Secretary of State as the Respondent.

2. The Appellants are nationals of Ethiopia whose appeals were allowed under the Immigration Rules and on human rights grounds by First-tier Tribunal Judge Scott in a decision promulgated on 9th January 2017.

3. The Secretary of State appealed that decision and set out detailed grounds. It was submitted that whether or not an independent family unit had been formed was a question of fact and the facts here were that the Appellant's own evidence was that she was not in touch with her children for nearly seven years. The children had lived with their grandmother quite independently. It was therefore not open for the judge to find that Rule 352D(iii) was met.

4. Furthermore it was a requirement for the Sponsor to leave the country of habitual residence in order to seek asylum but that had not happened in this case and the judge had noted that the Sponsor had spent some five years in Greece without seeking such protection. This evidence was that no such intention existed.

5. The Appellants failed to meet the Rules and had failed to deal with Sections 117A to 117D in the Article 8 assessment which in terms of **Dube (Sections 117A – 117D) [2015] UKUT 0090** was a material error in law.

6. Before me Mr Clarke for the Secretary of State submitted that there were material errors and the decision should be set aside and remade with the appeal being dismissed. Reliance was placed on the grounds. It was clear that the children had in fact formed an independent family unit and when the judge used the phrase that this was "a pragmatic necessity" (see paragraph 32 of the decision) that was an unreasonable finding. Furthermore the position was that the Sponsor had spent a considerable time elsewhere before she claimed asylum including five years in Greece. It was a perverse reading of the Rules to allow the appeal when the Rules said that she had to leave her country in order to claim asylum. There was a further material error under Article 8.

7. For the Appellants Ms Taiwo said it was important to note the Sponsor was a refugee. There were many reasons why persons did not clam asylum in the first country outwith their own country of nationality. It was critical to note that she had fled out of necessity and that had been found to be true by the Secretary of State. Accordingly the Secretary of State had taken into account that there was reasonable justification for her not claiming asylum in Greece. While the Article 8 decision had not looked at Section 117 of the 2002 Act reference had been made to **Razgar** and the important point was that this was a matter of substance and not form. There was no material error in the decision.

8. I reserved my decision.

Conclusions

9. The judge found (paragraph 30) that the Appellants were part of the Sponsor's family when she left Ethiopia. She went on to find the Sponsor credible (paragraph 31) and concluded that although there were years when there was no contact between the Appellants and their mother this did not mean that the Appellants had formed an independent family unit. The Appellants were very young dependants when their mother was deported and their grandmother had no option but to look after them. Her financial support for them had not been continuous but the relevant Rules do not require there to be such support.

10. The judge went on to note that the fact that they were left at a very young age with their grandmother when their mother was deported and found that this was not a decision to form an independent family unit but a pragmatic necessity. In my view that is a fair finding. There is no suggestion that the children were married or had formed a civil partnership or had formed an independent family unit. It was open to the judge, at the very least, to find that this was a pragmatic necessity. It followed that this part of the Rules were complied with.

11. The arguably difficult part of the Judge's decision is the finding that the Appellants complied with paragraph 352D(iv) namely that they were part of the family unit when the person left the country "in order to" seek asylum.

12. It is important to note that the Sponsor did have to leave her country of habitual residence and did claim asylum at a later date which was granted. The possible difficulty with the finding is the fact that there were several years between the two events but the rules do not lay down any period of time which has to be complied with. The point taken by Ms Taiwo is that the Secretary of State must have considered the delay in the mother claiming asylum at some point but nevertheless held that she was still a refugee. As the judge put it the Sponsor was deported and separated from her children against her will and that set in train her decision to seek asylum at a later date. In my view there is nothing perverse or irrational about the judge concluding that the provisions of 352D(iv) were met. She gave full reasons and while there was a significant delay in the claiming of asylum the fact of the matter is that the Sponsor was obliged to leave her country because of a fear of persecution which we know is true because she achieved refugee status in the United Kingdom albeit at a later date. It can therefore be inferred that the Sponsor left her country "in order to" claim asylum and the facts of this case are therefore rule compliant.

13. Accordingly it seems clear to me that there is no material error of law with the judge concluding that the Appellants met the requirements of 352D and the judge was therefore correct to allow the appeal under the Immigration Rules.

14. It is true that the judge did not consider Section 117 of the 2002 Act in terms of Article 8 and this was a clear error. However in the context of this case where the appeal had already been allowed under the

Immigration Rules the error was not a material one and it did not affect the outcome.

15. Accordingly in these circumstances there is no material error of law in the judge's decision which must stand.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision.

No anonymity order is made.

Signed *J Macdonald* Dated 26th September 2017

Deputy Upper Tribunal Judge J G Macdonald